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Supreme Court of the United States

OCTOBER TERM, 1938

No. 182

FORD MOTOR COMPANY,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD.

No. 183

FORD MOTOR COMPANY,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD.

BRIEF FOR THE PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1938

FORD MOTOR COMPANY, *Petitioner*, *against* NATIONAL LABOR RELATIONS BOARD.	No. 182
FORD MOTOR COMPANY, *Petitioner*, *against* NATIONAL LABOR RELATIONS BOARD.	No. 183

BRIEF FOR THE PETITIONER

Opinions below

The orders being reviewed were entered without opinion (R. 51, 108) and are unreported.

Jurisdiction

The order being reviewed in No. 182 was entered on May 5, 1938 (R. 51), and the order being reviewed in No. 183 was entered on June 10, 1938 (R. 108). The petition for writs of certiorari was filed on July 7, 1938, and the orders granting the writs were entered on October 10, 1938. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the

Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. § 347(a)). *Wilson* v. *Republic Iron & Steel Co.*, 257 U. S. 92; *Gay* v. *Ruff*, 292 U. S. 25; *United States* v. *Gulf Refining Co.*, 268 U. S. 542; *Forsythe* v. *Hammond*, 166 U. S. 506.

Statute Involved

The questions presented involve an interpretation of subsections (d), (e) and (f) of Section 10 of the National Labor Relations Act, 49 Stat. 449; 29 U. S. C. §§ 151-166 (hereinafter referred to as the Act), and can best be stated after a statement of the facts of the two cases.

These subsections of the Act, which are quoted in the pertinent parts of this brief, are also set forth in full in the Appendix hereto.

Statement of the Cases

The Board's Case (No. 182 in this Court; No. 7919 Below).

On December 22, 1937, in a case pending before it, the National Labor Relations Board (which we shall refer to as the Board) issued an order against petitioner requiring it to cease and desist from certain alleged unfair labor practices and to take certain affirmative action (R. 2).

On January 7, 1938, the Board filed in the court below a petition for the enforcement of such order (R. 1), and at the same time filed with the court a certified transcript of the record of the proceedings before the Board (R. 6).*

*The certified transcript was supplemented on January 10 (R. 8).

Upon the filing of the transcript, the jurisdiction of the proceeding passed from the Board to the court, by reason of Sec. 10(d), which provides:

> "Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it."

And such jurisdiction became exclusive, under Sec. 10(e), which provides:

> "Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein * * *. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final * * *."

Petition for leave to adduce additional evidence

On April 4, 1938, petitioner filed with the court below its petition for leave to adduce additional evidence (R. 40) pursuant to the provisions of Sec. 10(e), which provides:

> "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts,

or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order."

Petitioner's answer

Although not required to do so by any provision of the Act, petitioner on April 11, 1938, filed an answer to the Board's petition for enforcement, contesting the validity of the Board's order and praying that the order be "set aside" (R. 9). The answer alleged that the order was invalid on the following grounds, among others:

(a) that, by reason of fundamental defects and irregularities in its procedure the Board had failed to accord petitioner a full, fair and open hearing either in the taking of the evidence or in the subsequent parts of the proceeding (R. 9-17);

(b) that the trial examiner before whom the evidence was taken conducted himself as an advocate for the Board and the complaining union and questioned witnesses and otherwise conducted himself at the hearing in such manner as to cause witnesses to believe that it was their duty to give testimony unfavorable to petitioner and that they could with impunity give partial, misleading and false testimony provided that it was unfavorable to petitioner (R. 11-12);

(c) that the trial examiner, while improperly excluding evidence offered by petitioner, accepted

evidence in favor of the Board which had no probative value and was worthy of no credence (R. 12);

(d) that the Board did not itself consider the evidence, but without giving any judicial consideration to the case adopted as its own a decision prepared by its subordinates without according petitioner any opportunity to be heard thereon (R. 12-17), and

(e) that the Board in making its decision relied upon reports, memoranda and other communications extrinsic to the record, received from its employees (including employees who participated in the prosecution of the case), without according to petitioner any opportunity to test, refute or explain such reports, memoranda, and other communications, and was improperly influenced by extraneous considerations (R. 15).

As some of these allegations could be sustained only by evidence not appearing in the record, and as the Board had failed to deny any of them, petitioner filed with the court a motion to compel the Board to reply thereto (or, in the alternative, for a decree *pro confesso*); served upon the Board written interrogatories, and moved for a commission to take the depositions of certain witnesses (see R. 36-37, 40, 47).

The answer also challenged the order on various other grounds based on the record. It was alleged that the findings, in material and controlling respects, were not supported by the evidence; that the Board had failed to consider facts required to be considered, including facts ap-

pearing from the record and facts of common knowledge (see R. 21-25); that the findings failed to support the order, and that in other important respects the order exceeded, or represented an improper exercise of, the powers conferred upon the Board by the Act (R. 16-21). The answer alleged that the order, in so far as directed merely at criticism and disparagement of a labor organization by petitioner, abridged the freedom of speech and of the press in violation of the First Amendment to the Constitution (R. 19).

By its answer, the petitioner thus invoked the jurisdiction conferred upon the court under Sec. 10(e) of the Act—in a case where the Board has filed a petition for enforcement—to modify or set aside the order of the Board. Said paragraph provides that, upon filing of the transcript of record by the Board and notice to the adverse party, the court

> "shall have power * * * to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."

The Board's motion to withdraw

On May 2, 1938, the Board filed a motion for leave to withdraw, without prejudice, its petition for enforcement and the certified transcript of record (R. 35). Its motion adverted to certain of the issues raised by petitioner's answer, to petitioner's attempts to bring such issues to a hearing, and to the decision of this Court in *Morgan* v. *United States*, 304 U. S. 1.* and stated that the

*Decided April 25, 1938; petition for rehearing denied May 31, 1938.

Board's purpose was "to eliminate certain issues as to the validity of the Board's procedure" and "thereafter make its decision and order", having "obviated on the transcript of record" certain "questions" raised by petitioner's answer (R. 37-38). But the Board admitted none of the allegations of petitioner's answer, denied that the decision in *Morgan v. United States* was applicable, and asserted that petitioner had not asked for "affirmative" relief, and could not do so under the Act, and that the Board had "an absolute right to such withdrawal without prejudice to the filing of a new petition" (R. 38). It was stated (R. 37, par. 4) that

> "Should the motion be granted, the Board will then set aside its order, pursuant to Section 10(d) of the Act, issue proposed findings to which the parties will be permitted to file exceptions and if they so desire argue objections before the Board, and thereafter make its decision and order, or take such further or other action as may be deemed advisable."

On May 5, 1938, the court entered an order which recited the filing of the Board's motion for leave to withdraw its petition and the certified transcript and ordered that it "be and hereby is granted" (R. 51). The court did not purport to make any determination as to the validity of the Board's order, or as to the necessity or propriety of further proceedings before the Board, and did not set aside the Board's order.

The Board made no attempt to exercise the "leave to withdraw" the transcript of record, and on May 9, 1938, the court vacated so much of its May 5 order as permitted such transcript to be withdrawn (R. 54).

The Board did not purport to exercise the leave granted to it to withdraw its petition until June 2, 1938, when it filed

a paper stating that the Board "withdraws the petition for enforcement" (R. 55), but did not physically withdraw it from the files of the court. On June 10, 1938, the court denied a motion of the petitioner to vacate the order of May 5 which permitted such withdrawal, but granted a stay of such May 5 order (R. 58). Hence both the Board's petition and the transcript of record are still on file with the court below, and no further proceedings have been had before the Board.

Question Presented in No. 182

Upon the facts recited, the following question is presented for decision in No. 182:

> Where the Board applies to a circuit court of appeals for the enforcement of an order, and the exclusive jurisdiction of the court attaches under the Act, may the court—without passing upon the issues raised by the respondent's answer, without setting aside or modifying the order of the Board, and without exercising in any other way the powers conferred upon it by the Act—divest itself of jurisdiction by permitting the Board to withdraw its petition without prejudice?

Petitioner's case (No. 183 in this Court; No. 8019 below).

In its motion to withdraw, filed in No. 182 on May 2, 1938, the Board asserted that the petitioner had no right to ask for affirmative relief in that proceeding, under subsec. (e) of Sec. 10 of the statute (R. 38).

In order to remove any possible doubt of the court's jurisdiction to grant the relief asked for, petitioner on May 4 filed with the court below a petition under Sec. 10(f) of the Act, praying for a review of the Board's order and for a decree setting it aside (R. 62). That paragraph of the Act provides:

> "(f) Any person aggrieved by a final order of the Board * * * may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in * * * by filing in such court a written petition that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board."

A copy of the petition was duly served upon the Board.* There was no occasion, however, for petitioner to ask the Board to certify a transcript of the record for filing with the court below, since a duly certified transcript had already been filed in that court. Petitioner, therefore, filed with the court on May 4 a motion for an order consolidating the Board's case and petitioner's case and directing that the record filed in the Board's case be deemed filed in the consolidated case (R. 39). Petitioner also filed, on

*There has been filed in this Court as a supplement to the printed record a copy of the Board's acknowledgment of service of petitioner's petition on May 4, 1938, duly certified by the clerk of the court below to have been filed on May 5, 1938.

May 5, 1938, a motion in petitioner's case for an order directing that the record filed in the Board's case be deemed filed in petitioner's case or, in the alternative, directing the Board forthwith to provide petitioner with a certified transcript of record (R. 78).

The court did not pass on the motion to consolidate, but on May 9 made an order in No. 183 that the transcript of record already on file with it in No. 182 be deemed filed in petitioner's case (No. 183) as of the date of the filing therein of petitioner's petition for a review (R. 80). This order was entered at the same time as the order in the Board's case vacating so much of the order of May 5 as authorized the Board to withdraw the certified transcript of record (R. 54).

By such order the Court ruled that the filing of petitioner's petition on May 4, the record being on file, brought into operation the provisions of Sec. 10 (f) that

> "* * * the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction * * * in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; * * *"

Petitioner's petition challenged the validity of the Board's order on substantially the same grounds as did its answer in the Board's case.* Petitioner renewed in its own case its attempts to frame the issues and to adduce evidence in proof of its allegations (see R. 108). It also

*The petition contained a specific allegation that the Board, in making its decision, consulted with persons other than members of the Board or its employees with respect thereto (R. 70).

moved to amend its petition by adding thereto more definite allegations that the exercise of the Board's prosecuting and judicial functions had been so intermingled throughout the entire proceeding as to vitiate any order that the Board might make in the proceeding, and a further allegation that by reason of a fixed bias and prejudice of the Board against petitioner and in favor of the complaining union, the Board had failed to act as an impartial trier of the facts (R. 81, 106).*

The Board permitted more than twenty days to elapse without making any answer to the petitioner's petition. On June 2, 1938, it filed two motions, one praying for an order vacating the order of May 9 which directed that the transcript filed in the Board's case be deemed filed in petitioner's case (R. 85), and the other praying for an order "remanding the case to the Board" (R. 103). In the former motion the Board contended that, in view of the decision of this Court in *In re National Labor Relations Board,* decided May 31, 1938** (58 Sup. Ct. 1001), the Board has an *absolute right* to withdraw a proceeding under Sec. 10 of the Act whenever it announces an intention to take further action therein, since thereupon the order of the Board before the Court for review ceases to represent the Board's "final action" (R. 88).

The motion for a "remand" stated that it was filed "In the event that the Court denies the Board's motion, herewith filed, to vacate the Court's order of May 9" (R. 103). As stated by the Board in its brief in opposition to the

*When the court entered its orders of June 10 bearing upon the issues of withdrawal and remand, it also entered orders denying other pending motions in No. 183, including petitioner's two motions to amend its petition (R. 108).

**The opinion is set forth at R. 90 *et seq.*

petition for writs of certiorari, both motions were designed to accomplish "the same practical result" (p. 14), *i.e.*, to make it possible for the Board to take further action in the proceeding for the purpose of "obviating upon the record" certain of the issues raised by petitioner (R. 104).

On June 10, 1938, the court entered an order (R. 108) which disposed of all pending motions, including the Board's two motions of June 2. It denied the Board's motion to vacate the order of May 9 directing that the certified transcript be deemed filed in petitioner's case. It granted the Board's motion to "remand" petitioner's case to the Board as follows (R. 108):

> "The motion of respondent filed June 2, 1938, to remand this cause to the National Labor Relations Board for the purpose of setting aside its findings and order of December 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case, is granted."

but it stayed the order of remand pending determination of the issue by this Court upon petition for writ of certiorari (R. 108-9).

In granting the motion to remand, as in granting the order in the Board's case permitting it to withdraw its petition for enforcement, the court did not make or purport to make any determination as to the validity of the Board's order or as to the necessity or propriety of further proceedings before the Board and did not set aside the Board's order.

Question presented in No. 183.

Upon the facts recited, the following question is presented for decision in No. 183:

Where a person aggrieved by an order of the Board files a petition for review under Sec. 10(f) of the Act, and the transcript of the record has been filed in the court in accordance with the Act, may the court, upon application of the Board—without passing upon the issues raised by the petition, without setting aside or modifying the order of the Board, and without exercising in any other way the powers conferred upon it by the Act—divest itself of jurisdiction by "remanding" the case to the Board for further proceedings which the Board may desire to take?

The petition for writs of certiorari prayed for (1) a review of the order of May 5, 1938, in the Board's case granting the Board leave to withdraw its petition for enforcement and (2) a review of the order of June 10, 1938, in petitioner's case granting the Board's motion to remand petitioner's case to the Board.

Specification of Errors

The Circuit Court of Appeals for the Sixth Circuit erred:

1. In permitting the Board to withdraw without prejudice its petition for enforcement of its order.

2. In refusing to vacate its order permitting the Board to withdraw without prejudice its petition for enforcement of its order.

3. In failing and refusing to proceed in petitioner's case to a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.

4. In remanding petitioner's case to the Board.

5. In remanding petitioner's case to the Board without any determination that the order of the Board was invalid, without any determination as to the necessity or propriety of further proceedings before the Board, and without setting aside the Board's order.

6. In remanding petitioner's case to the Board without advice, direction or determination as to the law applicable to any further proceedings before the Board.

7. In failing and refusing to proceed in the Board's case to a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.

Summary of Argument

POINT I—The order in the Board's case permitting the Board to withdraw without prejudice its petition for enforcement was erroneous and should be reversed.

(1) The provisions of Section 10 of the Act expressly negative any right of the Board to a dismissal or "withdrawal" of the petition and any discretion in the Court to permit such dismissal or "withdrawal."

(2) Assuming that Sec. 10 could be construed so as to justify the action of the court below, such construction ought not to be adopted because it would defeat the purposes of the Act.

(3) The authorities governing voluntary nonsuits in ordinary civil litigation, if applicable, require a reversal of the order below.

POINT II—The order in petitioner's case (No. 183) remanding the case to the Board was erroneous and should be reversed.

A. The jurisdiction of the court below having attached, the Act required it to proceed to a determination of the case and precluded it from "remanding" the case to the Board without such determination.

(1) The order below was not a "remand" but was an abdication of the court's statutory jurisdiction.

(2) The court below had no power to "remand" the case without deciding it and setting aside the Board's order.

B. The authorities cited by the Board do not support the order of remand. On the contrary, these and other authorities show that the court was clearly in error in sending the case back to the Board without determining the issues raised by the answer.

The Board's alleged analogous cases, if in point, do not support its contention.

C. The action proposed by the Board purports to meet only one group of objections to the order which have been raised by the petition.

D. The Board's suggestion that the court below did not have jurisdiction of the petitioner's case raises issues which are not before the Court and in any event is without merit.

(1) The jurisdiction of the court in petitioner's case was complete upon the filing of the petition, independently of the order of May 9.

(2) The issuance by the Board of the notice of May 6 had no effect on the jurisdiction of the court.

POINT III—The orders below should be reversed and the cases remanded to the Circuit Court of Appeals for further proceedings in accordance with Section 10 of the National Labor Relations Act.

ARGUMENT

POINT I

The order in the Board's case permitting the Board to withdraw without prejudice its petition for enforcement was erroneous and should be reversed.

(1) The provisions of Section 10 of the Act expressly negative any right of the Board to a dismissal or "withdrawal" of the petition and any discretion in the Court to permit such dismissal or "withdrawal".

A consideration of the Act shows that its application is plain, and that the court below had no power to dismiss the petition.

Section 10 draws a clear line between the jurisdiction of the Board and the jurisdiction of the courts; it provides exactly when a shift of jurisdiction from the one to the other occurs; it excludes any right in the Board to oust the court's jurisdiction once it has attached, and equally excludes any power in the court to abdicate its statutory duties in favor of the Board.

Jurisdiction of the Board

The power of the Board to prevent unfair labor practices is, by subsec. (a), made exclusive; under subsec. (d) its jurisdiction continues *"Until* the transcript of the record in a case shall have been filed in a court", and up to that time it has the widest power to mold its processes in order to attain an effective and enforceable order. The filing of a complaint does not necessarily fix the issues to be decided;

for under subsec. (c) the power of amendment of a complaint continues during the hearing and thereafter until "the issuance of an order based thereon". Subsec. (c) makes filing of the written testimony with the Board the equivalent of submission of the case for decision; but even such submission does not exclude further action, since it is expressly provided that the Board "may take further testimony", subject to no limitation except that it must do so "upon notice".

Even when the Board issues its order in a proceeding, it still retains the utmost freedom of action, by reason of subsec. (d), which provides that, until filing of the transcript in a court,

> "the Board may at any time * * * modify or set aside, in whole or in part, any finding or order made or issued by it."

The presence in the statute of these specific provisions freely allowing the amendment of complaints and the supplementing of the record by such additional testimony as the Board may from time to time think necessary, and giving the Board unrestricted power over its orders after they have been issued, would negative the continuance of such power after the filing of a transcript in the court, even without the specific provisions of subsecs. (e) and (f) dealing with the court's jurisdiction.

Jurisdiction of the Court

Subsecs. (e) and (f) complement the provisions of the previous subsections, and emphasize the dichotomy.

Subsec. (e) provides that the Board, when it seeks enforcement of its order, shall file a transcript of record in the court and that

> "Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, *and to make and enter* upon the pleadings, testimony, and proceedings set forth in such transcript *a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part* the order of the Board. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."*

Subsec. (f) provides that any person aggrieved by a final order of the Board "may obtain a review of such order" in an appropriate court

> "by filing in such court a written petition praying that the order of the Board be modified or set aside".

It then provides for service of a copy of the petition and filing of the certified transcript, and that

> "Upon such filing, the court shall proceed in the same manner as in the case of an application by the

*All italics in these quotations are ours.

> Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner *to make and enter a decree* enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; * * *"

It will be noted that subsec. (e) provides that, after filing of the

> "transcript of the entire record in *the* proceeding"

and notice to the adverse party, the court shall have jurisdiction, and such jurisdiction shall be exclusive.

It will also be noted that the statute does not say that the court shall have exclusive jurisdiction only of the enforcement of the Board's order; it provides for exclusive jurisdiction

> "of *the* proceeding and of the *question determined* therein."

The "proceeding" is that which has been before the Board, and of which a transcript of the "entire record * * * including the pleadings and testimony upon which such order was entered and the findings and order of the Board" has been filed; and the *question determined therein* is the issue or issues which the Board has determined and which the court is to review. Hence it seems obvious that the court's jurisdiction is intended to be exclusive, not only of that of all other courts, but of that of the Board as well.

Moreover both subsecs. (e) and (f) invest the court with mandatory jurisdiction to make an affirmative decree

in favor of a successful respondent.* If the Board sues under Sec. 10 (e) and the court finds the order not enforcible, it must not only deny enforcement but must enter a decree setting the Board's order aside. *Per contra*, if a party aggrieved by an order sues under Sec. 10 (f) and the court refuses to set the order aside, it must make a decree enforcing the order of the Board either in its original form or as the court may modify it; and if the party aggrieved sues under Sec. 10 (f) for a modification of the order in any respect, the court is required to decree its enforcement in all other respects.

Under these provisions of the Act, the filing of the Board's petition for enforcement gave the court (the transcript of record having been filed) the same exclusive jurisdiction to set aside the Board's order as it would have had upon the filing of a petition by the petitioner for a review of the order, and this without regard to whether or not petitioner filed an answer or made any prayer for relief. However, petitioner did file an answer and did pray for relief and expressly asked that the order of the Board be "set aside" (R. 21).

Taking of additional evidence

That the intent of the Act is to make the Court's jurisdiction exclusive, not only of that of other courts but of that of the Board as well, is evidenced also by the provisions of

*The statute uses the words "the court * * * shall have power"; but this Court has held in a number of cases that language permissive in form must be regarded as imposing a mandatory duty when used to define the powers of a public authority. *Michaelson* v. *U. S.*, 266 U. S. 42, 70; *Supervisors* v. *United States*, 4 Wall. 435, 446; *Mason* v. *Fearson*, 9 How. 248; *Galena* v. *Amy*, 5 Wall. 705; *Ritchie* v. *Franklin County*, 22 Wall. 67.

subsec. (e) for the taking of additional testimony. Either the Board or the respondent may obtain leave of the court to adduce additional evidence upon a proper showing to the court of materiality and excuse for failure to adduce before the Board. In that event, the power of the court is "to order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript".

Such an order, however, does not divest the court of its exclusive jurisdiction or revest in the Board any power to modify its own order, but permits it only to modify its findings, and to file with the court "its recommendations, if any, for the modification or setting aside of its original order", whereupon the court must proceed with its statutory duty to enforce, modify or set aside the Board's order. Thus the fact-finding function of the Board is preserved and, if its modified findings of fact lead it to a conclusion different from that of the order which it originally made, it may advise the court to that effect. But the jurisdiction of the court to enforce, modify or set aside the Board's order remains plenary and exclusive.

The court's duties under this statute are clearly set forth. It has no option either to hear the case or to return it to the Board for whatever action the Board may care to take. It is mandatory upon the court to assume jurisdiction and to decide the case, with or without the taking of additional testimony.

Such is not only the clear meaning of the words used in the statute, but is a necessary conclusion to be drawn from the reasoning of the Court in *In re National Labor Relations Board, supra,* wherein the Court referred to the

filing of a transcript of record as a "plenary submission of the cause" to the court, and said:

> "The Act plainly indicates that the purpose was to give the court full and exclusive jurisdiction to review the Board's order in the respects indicated by the Act *once the transcript of the Board's proceeding is before it.*" (Italics ours.)

(2) Assuming that Sec. 10 could be construed so as to justify the action of the court below, such construction ought not to be adopted because it would defeat the purposes of the Act.

Subsecs. (e) and (f) are similar in their provisions with respect to the jurisdiction of the court and its powers, since subsec. (f) provides that, upon the filing of a petition for review and of a certified transcript of record, "the court shall proceed in the same manner as in the case of an application by the Board under subsec. (e) and shall have the same exclusive jurisdiction * * *". The two statutory provisions, therefore, must be considered and interpreted together.

The construction of the statute urged by the Board would result in endless confusion and delay. Neither party, having invoked the court's exclusive jurisdiction, would be bound to abide by it; and each could withdraw its court proceeding at any stage before decree whenever it might suit its purposes. In a case such as this, where the respondent does a nation-wide business, proceedings might be started and withdrawn in one after another of the ten circuit courts of appeals. Such a construction flies in the face of the express provisions of subsecs. (e) and (f) that the

court's jurisdiction shall be "exclusive" and that the court, whichever party invokes its jurisdiction, shall proceed to an affirmative decree in favor of the successful party. It also flies in the face of the provision of subsec. (i) that:

> "Petitions under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed."

In this case, the Board has neither admitted nor denied the validity of the objections raised by the petitioner which it wishes to "obviate on the transcript of record". If it admitted their validity, the court's duty would be to set aside the Board's order and if, as we should contend, the deficiencies of procedure were so fundamental that they were beyond correction, that would be the end of this particular proceeding.

On the other hand, if the Board had believed petitioner's objections to be without merit, its duty was to proceed with its suit and, if successful, to a decree of enforcement. The statute does not contemplate that the Board shall blow hot and cold; that it shall bow to the objections but prevent them from having their legal effect of invalidating the Board's order.

Nor does the statute contemplate that, after the court's jurisdiction has attached, the Board shall have power to select the issues which it wishes to have the court decide, withdrawing for reconsideration by itself any issues which it may find embarrassing, and to prevent the court from proceeding to consider the other defenses which have been raised. Yet that is what it has attempted to do here. Its proposed action is not responsive to the defenses set up by

the petitioner's answer, but only to some of them.* By taking these issues back to itself for reconsideration and possible cure, it prevents petitioner from having a hearing on other issues which it displays no intention to reconsider and which, if petitioner can establish them, involve administrative deficiencies so fundamental that no amount of reconsideration could cure them.

The court below did not set aside the order of the Board, and it remains outstanding against the petitioner. There is no duty imposed upon the Board hereafter to set aside its order. It is entirely free to change the intention which it expressed when it made its motion and to commence a new proceeding in the court below or in another circuit court of appeals. If, as the Board contends, the dismissal of the petition puts it back in the position where it stood prior to the filing of the transcript (in spite of the use of the word "Until" in subsec. (d)) then, under that subsection and the rules of the Board, it has a wide field of choice as to further procedure.

It may, for example, let the case lapse for a year or two for some supposed reason of policy. It may amend its complaint to charge unfair labor practices not charged in the original complaint, thereby increasing the prejudice to petitioner from the pendency of undetermined charges against it. It may consolidate the case with other cases against petitioner, either now pending or hereafter instituted.

It may, in fact, take additional evidence to support its position on one or more of the issues in the case, and at the same time refuse to take the additional evidence which

*This subject is more fully developed under Point II, *infra* pp. 69-74.

the petitioner desires to adduce in order to support its defenses on other issues*; and this in spite of the clear purpose of the statute to make the taking of additional evidence a matter for the court to decide, whether the party which seeks leave to adduce additional testimony be the Board or the respondent.

By reason of these and other possibilities, the orders of the court below subject the petitioner, not only to further proceedings before the Board for the ostensible purpose of eliminating certain of the issues raised by its answer, but to proceedings of scope and duration limited only by the Board's concept of its full power under the Act.

When the Board's motion to withdraw was granted, there was pending a motion by petitioner for leave to adduce additional evidence; and by reason of the action which it took, the court below did not pass upon this motion. Thus petitioner was denied the right, clearly given to it by the statute, to have the court pass upon the question whether such additional evidence is "material" and whether there were "reasonable grounds for the failure to adduce such evidence in the hearing before the Board", and to have such evidence taken if the court should find in its favor on those issues. This fact alone makes the order below invalid, apart from the other considerations to which we have referred.

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*We are not suggesting in any of these illustrations that the Board would deliberately act in violation of the law, but are merely pointing out the numerous courses of action which might be open to it, any one of which it might choose for some supposed reason of policy, wise or unwise; and to show how far the Board would be in a position to depart from the relatively simple and prompt course of procedure which the Act on its face provides for, once the Court has acquired jurisdiction.

The statute contemplates a proceeding before the Board which is brought to a conclusion, and which then passes into the exclusive jurisdiction of the court for final determination. Under the Board's theory, if the answer sets up defenses which appear to be well taken, or which the Board may consider dangerous, or which, for some reason of policy—administrative, economic, social or political—the Board may not care to have litigated, then it may simply withdraw its petition, set aside the order, attempt to correct the error or eliminate the unwanted issue, and make another order. If, on another petition for enforcement, the respondent again sets up good or dangerous defenses, the process may be repeated, and so on until the respondent is either worn out or insolvent, or the Board decides to submit to a court's jurisdiction. During all this period, the respondent suffers the prejudice that necessarily flows from the pendency of charges of unfair labor practices.

The purpose of the Board's motion was, as appears from the face of the motion papers, to avoid going to issue on meritorious defenses and to prevent or postpone a decision against it. This purpose was clearly improper; the Board has no standing to insist that it shall sit in judgment on itself, in place of the court, on whom the duty has been imposed by Congress.

(3) The authorities governing voluntary nonsuits in ordinary civil litigation, if applicable, require a reversal of the order below.

The Board has based its case in No. 182 entirely upon the assumption that in this purely statutory proceeding the same rules for dismissal without prejudice must apply as

in ordinary civil litigation—in spite of the express provisions of the Act which require the court, whichever party invokes its jurisdiction, to proceed to a decree in favor of the successful party, whether petitioner or respondent.

Even apart from the express provisions of the Act, there is a vast difference between a withdrawal without prejudice of the Board's petition and the voluntary dismissal of a suit by a private plaintiff.

When a private litigant dismisses a bill of complaint, the case is at an end. Another proceeding may or may not be instituted. Here, however, withdrawal by the Board of its petition does not end "the proceeding". It merely transfers it from the jurisdiction of the court to the jurisdiction of the Board, thus (while leaving the Board in its position of prosecutor) replacing the court by the Board for the purpose of exercising the judicial function. Upon such transfer, petitioner must continue to participate in the proceeding—to whatever extent necessary for the protection of its rights and no matter what may be the nature of the further proceedings which the Board, exercising the plenary power which it asserts, may determine to take.

The question therefore is not, as in the case of a private litigant, *whether* the proceeding shall continue over plaintiff's objection, but simply *where* the proceeding shall continue. As thus formulated, the answer to the question is very simple, since, as we have pointed out, the Act clearly contemplates that the proceeding shall be conducted before the Board *until* a transcript is filed with the court and shall *thereafter* be conducted in a circuit court of appeals of appropriate territorial jurisdiction.

However, the authorities governing voluntary nonsuits in ordinary civil litigation are, if applicable, conclusive in demonstrating that the court's order permitting the Board to withdraw was erroneous.

Equally well established as the doctrine that a plaintiff may dismiss his suit if the defendant will not be prejudiced thereby is the doctrine that prejudice to defendant such as will bar plaintiff from a voluntary nonsuit is present if the defendant is in a position to demand on the pleadings an opportunity to seek affirmative relief. The principle was clearly stated by this Court in *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 93-94:

> "The usual ground for denying a complainant in equity the right to dismiss his bill without prejudice at his own costs is that the cause has proceeded so far that the defendant is in a position to demand on the pleadings an opportunity to seek affirmative relief and he would be prejudiced by being remitted to a separate action. Having been put to the trouble of getting his counter case properly pleaded and ready, he may insist that the cause proceed to a decree."

There can be no doubt that petitioner was in a position to demand on the pleadings an opportunity to seek affirmative relief, in the form of an order of the court setting aside the Board's order. Nor can there be any doubt that petitioner had been put to the trouble of getting its counter case properly pleaded and ready, as may be seen from the following review of only some of the affirmative steps taken by the petitioner after the making of the Board's order on December 23, 1937.

On January 3, 1938, petitioner moved the Board that the order be set aside and a rehearing granted, and in its petition set forth in considerable detail the grounds of the asserted invalidity of the order (R. 21-31). This motion was denied on January 4, 1938 (R. 8). Thereupon petitioner filed a return to the Board's order, framing the issues between itself and the Board (R. 31-34).

About three months after the filing of the Board's petition with the court below, and after the record below had been agreed upon and printed, petitioner on April 11 filed an answer consisting of 64 paragraphs and containing a detailed statement of its defenses and of the basis of its prayer for affirmative relief (R. 9-21). On April 4 it had moved the court for leave to adduce additional evidence, in accordance with the statute (R. 40). On April 11 it moved for an order compelling a reply to certain affirmative allegations in the answer (R. 36). On April 27 it moved for a commission to take depositions of the members and staff of the Board on certain issues raised by the answer (R. 40). On May 2 it addressed to the Board written interrogatories on these matters (R. 40).

Under these circumstances, it is difficult to see what more the petitioner could have done in order to bring itself within the language of *Ex parte Skinner*, as a defendant who had "been put to the trouble of getting his counter case properly pleaded and ready". The petitioner had taken every step that it could take in order to have its rights adjudicated, and clearly it is entitled to the benefit of the rule laid down in that case.

The authorities do not support the Board's position that relief is not "affirmative" where the granting of such relief to the defendant would have no greater legal effect than

a dismissal of plaintiff's bill on the merits. On the contrary, the typical case for application of the rule is one where what the defendant is seeking is an adjudication of the plaintiff's claim, and where the affirmative relief which the defendant asks will have the same legal effect as a dismissal of the plaintiff's case on the merits.

For example, in *City of Detroit* v. *Detroit City Railway Company*, 55 Fed. 569, an opinion by Chief Justice Taft which was cited and quoted in *Ex parte Skinner & Eddy Corp., supra* (265 U. S. at 93), the City of Detroit sought to oust the railway company from the streets of the City under an ordinance purporting to repeal its franchise, and the railway company by its answer prayed that the ordinance be declared void and that the City be enjoined from attempting to enforce it. It was held that the City could not take a voluntary dismissal, although an adjudication in favor of the defendant upon its answer, even accompanied by an injunction, would have no greater effect than a dismissal of the plaintiff's bill because of the invalidity of the repealing ordinance.

Similarly, where a plaintiff seeks to enforce a lien and defendant by answer or cross-bill asks that the lien be adjudged invalid, the plaintiff may not dismiss without prejudice.

Stevens v. *The Railroads*, 4 Fed. 97*;
Callahan v. *Hicks*, 90 Fed. 539;
Sauter v. *First National Bank*, 8 F. (2d) 121.

And where a plaintiff puts in issue the conflicting patents or patent licenses of itself and the defendant, and the defendant seeks an adjudication that plaintiff's patent

*Aff'd *sub nom. Tennessee Bond Cases*, 114 U. S. 663.

or license is invalid, plaintiff is not allowed to dismiss without prejudice.

Electrical Accumulator Co. v. *Brush Electric Co.*, 44 Fed. 602;
Hat-Sweat Mfg. Co. v. *Waring*, 46 Fed. 87;
Automotive Products Corp. v. *Wolverine B. & S. Co.*, 15 F. (2d) 745;
Cf. In re Georgia Power Company, 89 F. (2d) 218, cert. den. 302 U. S. 692.

In each of the above cases, and in those which are cited below, the defendant's purpose was an adjudication of the invalidity of the plaintiff's claim, and the defendant's interests would have been served as well by a judgment dismissing the plaintiff's bill on the merits as by granting the defendant a decree, either affirmative in form or in the nature of a declaration of its rights. These cases support the proposition that where the relief that the defendant asks for is an adjudication of the plaintiff's claim in its favor, and the interest of the defendant in the matter is of such a nature that it would itself be entitled to maintain a suit for the purpose of obtaining such adjudication, it may successfully oppose an application by the plaintiff for a voluntary dismissal without prejudice and insist that the controversy be decided.

In view of these authorities, the proposition asserted by the Board* that, "The setting aside of an order, having no greater effect than a denial of the prayer of a petition to enforce, is not 'affirmative relief' barring the plaintiff's right to a nonsuit", is clearly erroneous.

*Br. in Op. to Pet. for Cert., p. 11.

Under these authorities, it is of no importance in the present case that a decree setting aside the Board's order might have no greater legal consequence than a decree dismissing its petition for enforcement on the merits. By expressly permitting any person aggrieved by an order of the Board to institute a proceeding on his own behalf to have it modified or set aside—and also by requiring that, if the order shall be held invalid in a proceeding instituted by the Board, the court shall set it aside and not merely refuse to enforce it—Congress has clearly recognized that the interest of a person aggrieved by such an order in having a judicial determination of its validity or invalidity is not merely a defensive interest, but is an affirmative one. It seems absurd for the Board to contend that the right to a decree "setting aside" the Board's order is not a right to affirmative relief, such as to bar a voluntary dismissal, when such relief can be the sole object of a suit initiated by the aggrieved person.

Although petitioner's contentions in this respect are based upon no novel doctrine, such contentions receive added support from a clearly marked tendency in the cases to recognize that a person may have an affirmative interest in obtaining relief which has no other effect than to be *res adjudicata* of an issue between the parties, upon which the plaintiff may, but has not as yet, brought suit. Thus a person accused of infringement of a patent may sue under the Federal Declaratory Judgment Act for a judgment declaring that no such infringement exists or that the patent is void.

Zenie Bros. v. *Miskend,* 10 F. Supp. 779;
Mitchell & Weber, Inc. v. *Williamsbridge Mills,* 14 F. Supp. 954;

Link-Belt Co. v. *Dorr Co.*, 15 F. Supp. 663; *Cf.* Borchard, *Declaratory Judgments* (1934), p. 68.

On the other hand, a defendant may counterclaim for a declaratory judgment, and such a counterclaim will bar the right of the plaintiff to have a voluntary dismissal. See *Meinecke* v. *Eagle Druggists Supply Co., Inc.*, 19 F. Supp. 523, 525; *Link-Belt Co.* v. *Dorr Co.*, *supra*, at 664. Of course, the prejudice which would result to defendant from a voluntary dismissal where defendant has counterclaimed for a declaratory judgment is removed when, prior to the motion for dismissal, defendant has already instituted a direct suit of his own to enforce the same rights which he has set up in his counterclaim. *Aetna Life Insurance Co.* v. *Wilson*, 84 F. (2d) 330, relied upon by the Board.

In *Bronx Brass Factory, Inc.* v. *Irving Trust Co.*, 297 U. S. 230,* where a trustee in bankruptcy successfully opposed voluntary dismissal of a claim, his sole interest in having the claim expunged on the ground of an unlawful preference was to obtain a decision on the issue of preference, which would be *res judicata* in a subsequent plenary suit by the trustee to recover the assets which were the subject of the preference.**

Moreover, even if what petitioner has asked for and is entitled to in this case were not affirmative relief, the case would fall within another well-established exception

*Affirming *In re J. R. Palmenberg Sons*, 76 F. (2d) 935.

**It is necessary for a trustee in bankruptcy to bring a plenary suit to recover such assets. *Breit* v. *Moore*, 220 Fed. 97; *McCulloch* v. *Davenport Savings Bank*, 226 Fed. 309; *Lincoln* v. *People's National Bank*, 260 Fed. 422.

to the rule permitting voluntary dismissals, namely, that where the continued existence of the plaintiff's unadjudicated claim is prejudicial to the defendant's business, a dismissal without prejudice will not be permitted over the defendant's objection.

This rule is an application of the broad doctrine as to voluntary dismissals stated in *Ex parte Skinner & Eddy Corp., supra* (265 U. S. at 93), in the following quotation from the *City of Detroit* case:

> "It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, on payment of costs, was of course except in certain cases. *Chicago & A. R. Co.* v. *Union Rolling-Mill Co.*, 109 U. S. 702. The exception was where a dismissal of the bill would prejudice the defendants in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind."

A. C. Gilbert Co. v. *United Electrical Mfg. Co.*, 33 F. (2d) 760, is a case in point. The suit was for infringement of a patent. The answer set up no right to affirmative relief, but alleged want of equity in the bill on the ground that plaintiff had been guilty of an unfair trade practice in that it had sent letters to customers and potential customers of the defendant asserting that the products of the defendant were infringing the plaintiff's patents and advising of the institution of the suit. Before the case came to trial the plaintiff moved for a voluntary dismissal, stating as the reason for such dismissal one which a court would ordinarily find persuasive, namely, that after the commencement of the suit the plaintiff had instituted a

suit on the same patent in the District Court of Connecticut against one of defendant's customers; that it was not necessary to have two suits pending and that it preferred to prosecute the suit in the latter jurisdiction, where its principal place of business was located.

The court refused to permit dismissal, saying (p. 762) that it was clear

> "that a dismissal of this bill without prejudice would deprive the defendant of substantial rights and equities arising from the conduct of the plaintiff mentioned, and that the defendant is equitably entitled to meet the plaintiff, on the merits of the issues raised by the plaintiff, in the legal contest to which it has been thus publicly challenged."

In other cases involving patents, but in which the defendant claimed no affirmative relief, it has been held that the defendant's interest in obtaining an adjudication of plaintiff's patent as either valid or invalid, in order that it may carry on its business either in conformity with plaintiff's rights or free from restrictions, as the case may be, is sufficient to justify a refusal to grant the plaintiff a voluntary dismissal.

Churchward International Steel Co. v. *Carnegie Steel Co.*, 286 Fed. 158;

Hills v. *Federal Optical Co.*, 295 Fed. 213;

Bassick Manufacturing Co. v. *Seltzer*, 37 F. (2d) 579;

Dooley Improvements, Inc. v. *Motor Improvements, Inc.*, 6 F. Supp. 161;

Lunati v. *Marnall Steel Products Co.*, 10 F. Supp. 282.

It seems almost unnecessary to point out that the present case is one in which the petitioner has a vital interest in having its rights determined, since under the Board's order it stands convicted of unfair labor practices, and such order has been widely publicized. The continued pendency of the proceeding, after the Board has once made a decision against petitioner, necessarily affects it adversely, and such effect would be in no way dispelled by the Board's taking the case back and setting aside its order in order that "questions concerning the validity of the Board's procedure" may be "obviated on the transcript of record" (R. 37-38) and another order made.

The authorities cited show that the order below was erroneous, even apart from the provisions of the Act. In addition, as we have pointed out, the action of the court below was contrary to the purpose and intent of the Act and inconsistent with its express provisions.

POINT II

The order in petitioner's case (No. 183) remanding the case to the Board was erroneous and should be reversed.

When on May 2, 1938, the Board moved for leave to withdraw its petition for enforcement in No. 182 (R. 36), it took the position that the relief which petitioner had asked for in its answer and was entitled to under the Act was not "affirmative relief". If the Board's argument were correct, it could only mean that a respondent in a proceeding under Sec. 10(e) remains in court only at the pleasure of the Board, and must file its own suit under Sec. 10(f) if it is

to have the right to insist that the court exercise its statutory jurisdiction to decide the controversy.

Hence the logical answer to the Board's position, and the logical next step in petitioner's efforts to get its rights adjudicated, was the filing of its own petition under Sec. 10(f). Accordingly, petitioner filed such petition with the court below on May 4, 1938 (R. 62).

In view of the position thus taken by the Board, it is difficult to understand its description of petitioner's petition to review as "redundant", with the implication that for redundancy it may be disregarded. Such a suggestion is wholly inconsistent with the position of the Board in No. 182, since it amounts to a concession that petitioner's answer in No. 182 entitled it under the statute to the same affirmative relief it could obtain by petition to review in No. 183. If such was the Board's view, its proper motion was to dismiss the petition in No. 183, as being surplusage in view of the prayers contained in the answer in No. 182. It made no such motion, and has not applied for a writ of certiorari to review the orders by which the court below assumed and exercised jurisdiction of the petitioner's case.

The court below did not find the petitioner's petition "redundant". On the contrary, it assumed jurisdiction thereof in accordance with the Act. Having on May 5, the day after the petition was filed, granted leave to the Board to withdraw its case (No. 182), the Court on May 9 entered an order in the Board's case and another order in the petitioner's case, the combined effect of which was to recognize that jurisdiction of the petitioner's case attached as of May 4 and to impound the record in No. 182 for use in No. 183.

Specifically, as stated above, the Court's May 9 order in the Board's case annulled that part of its May 5 order which would have allowed the Board to withdraw the certified transcript from the files, leaving outstanding only the permission to the Board to withdraw its petition; and the order of May 9 in the petitioner's case confirmed the Court's jurisdiction thereof as being effective from May 4, by ordering that the transcript of record should be deemed to have been filed in No. 183 as of the time of the filing of the petition, *i.e.*, as of May 4.

When on June 2 the Board made its motion that the Court "issue an order remanding the case to the Board for further proceedings" (R. 103), it stated its purpose as follows (R. 103-4):

> "2. In addition to the completion of the proceedings pending before the Board and of the record thereof, the granting of the motion herein would result in *obviating* upon the record *certain* questions sought to be raised by the Company concerning the validity of the Board's order, * * *. Should the instant motion be granted, the Board *now advises the court* that it will forthwith set aside its findings and order of December 22, 1937, issue proposed findings to which the parties will be permitted to file exceptions, and if they so desire argue objections before the Board, and thereafter, upon reconsideration of the entire case, make its decision and order, or take such further action as may be deemed advisable."*

On June 10, 1938, the court handed down an order in which, among other things, it granted the motion to remand in the following language (R. 108):

*Italics ours.

> "The motion of respondent filed June 2, 1938, to remand this cause to the National Labor Relations Board for the purpose of setting aside its findings and order of December 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case, is granted."

A. The jurisdiction of the court below having attached, the Act required it to proceed to a determination of the case and precluded it from "remanding" the case to the Board without such determination.

When the Board's motion to remand was made, the petition to review and set aside the Board's order had been duly filed and notice thereof had been given in accordance with the statute; the transcript of record as certified by the Board had been filed in petitioner's case (R. 80), and the provisions of Sec. 10 (f) were fully applicable:

> "Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction * * * in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; * * *."

Under this provision, if the court's action in permitting withdrawal of the petition in No. 182 made that petition inoperative as a basis for the jurisdiction of the court over the proceeding, the filing of the petition and record in No. 183 was effective to retain in the court the exclusive jurisdiction for which Sec. 10 (f) provides. It was therefore mandatory upon the court to proceed to a decision of the

petitioner's case, and it had no power under the Act to remand the case to the Board without deciding the issues raised by the petition.

(1) *The order below was not a "remand" but was an abdication of the court's statutory jurisdiction.*

By granting the Board's motion to remand the petitioner's case to the Board, the court divested itself of jurisdiction and surrendered it to the Board. The proceeding is statutory, and the powers of the court must be found in the Act. It will not be contended that the Act in express terms authorizes the court thus to divest itself of jurisdiction.

Nor may such power be implied. On the contrary, the Act contemplates that the court, once its jurisdiction has attached, shall proceed to an affirmative decree in favor of one party or the other.

While, as we have stated, the Board referred to the decision of this Court in the *Morgan* case in connection with its motion, it did not by answer or otherwise admit those allegations of fact in the petition which, if true, would bring the order within the *Morgan* case. Had it done so, the petitioner would have been entitled to a decree setting the order aside.* Nor did it move to dismiss either upon the ground that the petition failed to state a cause of action or that the court was without jurisdiction. On the contrary, its motion to "remand" necessarily confessed both the sufficiency of the petition and the jurisdiction of the court. Neither confessing error nor challenging the sufficiency of the complaint, the Board moved that the case be remanded

*The authorities are cited *infra*, pp. 46-57.

to it upon the ground that the granting of the motion "would result in obviating upon the record certain questions sought to be raised by the Company concerning the validity of the Board's order" by permitting the Board to take further proceedings and enter a new order (R. 104).

The granting of this motion amounted to a dismissal of petitioner's case on motion of respondent, not because of any defect in petitioner's case but merely because respondent does not wish to litigate the issues as made. As we have already pointed out, a plaintiff, according to the established usages of judicial proceedings, may not be permitted to discontinue his suit without prejudice where the defendant has prayed for affirmative relief. Even more extraordinary is the theory, implicit in the action of the court below, that a court, upon motion of a defendant, may order the plaintiff's case to be discontinued or dismissed, except upon a motion to dismiss for lack of jurisdiction, for failure to state a cause of action, or upon some other kindred ground.

The Board asserts that a reviewing court has a general "inherent" power to remand a case to an administrative tribunal whenever it sees fit. As we show below, there are no authorities to support the existence of a power so vague and nebulous, and so entirely inconsistent with the statutory scheme. The existence of any such power, prior to decision of the case, would defeat the provisions of Sec. 10(d) of the Act, terminating the Board's jurisdiction upon the filing of the transcript of record; the provisions of Sec. 10(e) and Sec. 10(i) conferring upon the Court exclusive and plenary jurisdiction upon the filing of such transcript, and the provisions of Sec. 10(f) conferring upon any person aggrieved by an order of the Board an unqualified right to judicial review thereof. Moreover, as we have pointed out

under Point I, the only provision which the Act contains, whereby further proceedings may be had before the Board, is the provision for the taking of additional evidence before the Board, for good cause shown to the court. Even in this connection, however, power in the Board to set aside its order and make a new one is expressly withheld. Its authority is confined to the filing with the court of "its recommendation, if any, for the modification or setting aside of its original order", by reason of such additional evidence (Sec. 10(e)). Power to modify or set aside remains exclusively with the court. By thus limiting the powers of the court and Board, the Act clearly negatives the existence of any power in the court to remand the case to the Board for any reason, before the court has decided the case, and also clearly negatives the asserted power of the Board to set aside its own order after a court has acquired jurisdiction, and to make a new order after further proceedings nowhere provided for in the Act.

Had Congress intended to confer power upon the court to remand the case to the Board or to provide for further proceedings before the Board of any description other than as now provided for in the Act, it would have made express provision therefor in the Act. See

United States v. *Pennsylvania R. Co.*, 242 U. S. 208, 231;

United States v. *Louisville & Nashville R. Co.*, 236 U. S. 318,

If the court was empowered in petitioner's suit to remand the case to the Board and divest itself of jurisdiction, in order that the Board might obviate the issues referred to in its motion, then it must follow that the court is empow-

ered so to remand any case under Section 10 of the Act for the purpose of permitting the Board to proceed further and obviate the determination of *any* issue which the Board may desire to obviate.

In this particular case the Board requested the court to divest itself of jurisdiction and remand the case to the Board for the purpose of permitting the Board to take further proceedings in compliance or pretended compliance with the decision of this Court in the *Morgan* case, and to enter a new order. Failure to accord to the respondent in a proceeding before an administrative tribunal that "full, fair and open" hearing which the law requires is not the only ground upon which an order of such a tribunal may be set aside. As said by this Court in *Morgan* v. *United States*, 298 U. S. 468, 480:

> "There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. *United States* v. *Abilene & Southern Ry. Co., supra.** Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order."

It will scarcely be contended that if in a petition to set aside an order of the Board it was alleged that the order was invalid upon any or all of the grounds stated, the court upon motion of the Board could, instead of determining the issues thus raised, divest itself of jurisdiction and remand

*265 U. S. 274.

the case to the Board for the purpose of permitting it to "obviate" or "eliminate" such issues.

Assume, for example, a case in which the petition alleges the order to be invalid because of the absence of findings sufficient in law to support it. This contention being thus directed to the attention of the Board, the Board concludes that there may be doubt as to the sufficiency of the findings made; but without conceding them to be deficient it moves the court to divest itself of jurisdiction and remand the case to the Board to enable the Board to set aside its order and make new findings and a new order, thus "obviating" or "eliminating" the issues raised in respect of the order sought to be set aside.

Or assume that the Board has made a finding alleged by the petition to be unsupported by evidence. The Board, reviewing the evidence in the light of the petition, reaches the conclusion that there may be danger that the court would so hold. It also reaches the conclusion that the fact found, although erroneously considered by the Board in the making of its order, is not essential to its final conclusion. It therefore moves the court to divest itself of jurisdiction in order that it may itself set aside the order, eliminate the finding in question and make a new order.

Not only does the Act contemplate no such procedure but the common experience of all men suggests how easy it would be for a tribunal which is also an interested party, once having arrived at a conclusion, to believe that it would have arrived at the same conclusion if it had not made the finding under attack, or that it would have made the findings which are lacking had it considered them.

If the Board had the right which it claims to divest the Court of its jurisdiction, then the Board's orders would

become nothing more than trial balloons. If they met with no opposition they would be enforced. If the respondent had the means and the inclination to oppose the Board, and set up meritorious defenses, the cases could be taken back for more careful consideration. A rule which would permit this sort of practice would obviously be against public policy, for it would encourage administrative excesses and administrative carelessness, would permit administrative proceedings to be prolonged interminably, and in effect would deny judicial review except at the will of the administrative body.

(2) *The court below had no power to "remand" the case without deciding it and setting aside the Board's order.*

The order below was not a "remand" in any proper sense of the word but was an order dismissing petitioner's petition upon motion of the Board and over petitioner's objection, although the Board's motion did not charge that petitioner's petition failed to state a cause of action or that the court was without jurisdiction or any other grounds which would support a dismissal.

It is necessary to distinguish between a "remand" resulting from the exercise of the mandatory functions of an appellate court with respect to an inferior court and a "remand" resulting from the quite different function of a court invested with statutory authority to pass upon the validity of administrative orders. Even where a federal court has decided the issues on review of an administrative order and has held it invalid *and set it aside*, the entry of an order purporting to "remand" the proceeding to the

administrative body does not effect a "remand" in the ordinary sense of the word.

A constitutional Federal court, upon which jurisdiction has been conferred to review the orders of an administrative tribunal, does not sit as a supervisory administrative tribunal. *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464. It is without authority either to give directions to such a tribunal or surrender its jurisdiction thereto. *Cf. Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 278.

Decrees of federal courts purporting to "remand" administrative proceedings to administrative bodies in fact do not do so. Such an order of "remand" recognizes the propriety of further action by the administrative body but does not require the administrative body to do anything. It is merely a declaration that further action by the administrative body, if it is to be approved by the court upon subsequent review, must be consistent with the law as laid down by the court in passing upon the administrative order. In such a situation, the actual order of the court is that the administrative order be set aside.

In *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co., supra,* this Court was called upon to construe the meaning of "remand" under a statute providing for review on questions of law of orders of the Federal Radio Commission. It said (at p. 278):

> "* * * When on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision upon the legal question whether the Commission has acted within the limits of its authority, and to have their rights, as established by law, determined accordingly, there is a case or

> controversy which is the appropriate subject of the exercise of judicial power. The provision that, in case the Court reverses the decision of the Commission, 'it shall remand the case to the Commission to carry out the judgment of the Court' means no more than that the Commission in its further action is to respect and follow the Court's determination of the questions of law."

It is clear, therefore, that an order of remand prior to a decision of the case is a contradiction in terms; that a condition precedent to an order "remanding" a proceeding to an administrative body is that the court shall determine the legal question whether the administrative body has acted within the limits of its authority and, if it has not, shall reverse the decision or set aside the order of the administrative body. The "remand" is merely a declaration that the decision is without prejudice to further proceedings consistent with the law as determined by the court.

Therefore, although in some cases this Court has "remanded" administrative proceedings to an administrative body, in each such case the Court has made a determination as to the validity of the administrative order, has laid down rules of law to guide the further proceedings of the administrative body, and has either *set aside the administrative order* or taken action which is the equivalent thereof.*

Even when sitting in a purely appellate capacity to review the orders or decrees of a District Court, to which it may remand cases and to which it may give directions,

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*See cases cited and discussed *infra*, pp. 50-57.

a circuit court of appeals may not remand a case to the district court, with either direction or permission to take further proceedings, and thereafter enter a new decree, if it sees fit, *without itself first setting aside* the decree or order appealed from. *Duke Power Company* v. *Greenwood County*, 299 U. S. 259, 268. Much less may a court, without specific statutory authority, surrender its jurisdiction to an administrative tribunal and thus escape performance of the judicial function imposed upon it. It is concerned only with the validity of the order before it. If valid, it is required to enforce it; if invalid, to set it aside. Only if the order be held invalid and be set aside on grounds not inconsistent with further action in the proceeding may there be a "remand" even in the loose sense.

The order of the court below remanding petitioner's case to the Board was, therefore, not a remand in the sense in which remands have been made by federal courts either after reviewing administrative orders or after reviewing action of inferior courts, but is in fact an order dismissing petitioner's petition for a review of the Board's order, over petitioner's objection, and without any claim on the part of the Board that petitioner's petition fails to state a cause of action or is defective on any other ground which could be the basis for a dismissal of the petition.

The order of remand is, therefore, expressly contrary to the provisions of Sec. 10 (f), which confer upon any person aggrieved by an order of the Board the right to obtain a review thereof. If the order be sustained, Sec. 10 (f) of the Act is a nullity and a person aggrieved by an order of the Board has in fact no right to obtain a review thereof by a court except when, as and if the Board shall be willing to submit to the court's jurisdiction.

B. The authorities cited by the Board do not support the order of remand. On the contrary, these and other authorities show that the court was clearly in error in sending the case back to the Board without determining the issues raised by the answer.

The Board's analysis of the authorities might lead one to suppose that reviewing and appellate courts have an indiscriminate and arbitrary power to remand any case, at any stage, and for any reason, to an administrative tribunal or lower court, upon application of such tribunal or court or of any party to the litigation. Actually, the judicial procedure governing remands is not in so chaotic a state; the applicable principles of law are well settled; the function of a remand may be defined quite precisely, and the general power which the Board has argued for does not exist.

The only direct authorities cited by the Board, *i.e.*, those involving administrative orders, give no support to its argument because they are all cases in which the reviewing court fully discharged its function to decide the issues and then either (a) held the administrative order invalid and did not remand the case (the invalidity of the order being incapable of correction) or (b) set aside the order and remanded the case to the administrative body so that it might, if it chose, proceed according to law. These cases are:

Texas & Pac. Ry. Co. v. *Interstate Commerce Commission*, 162 U. S. 197;

Southern Ry. Co. v. *St. Louis Hay & Grain Co.*, 214 U. S. 297;

Federal Trade Commission v. *Curtis Publishing Co.*, 260 U. S. 568;

International Shoe Co. v. *Federal Trade Commission*, 280 U. S. 291;
Federal Trade Commission v. *Royal Milling Co.*, 288 U. S. 212.

A brief consideration of these cases will make clear the function of the "remand" in proceedings to review administrative orders.

In the *Texas & Pacific* case, the Commission on its own motion, and without a hearing, made an order requiring that inland tariffs should apply to all imported articles transported in the United States, thus forbidding through rates from foreign ports to points of destination in the United States. Thereafter, upon a hearing limited to the question whether they had violated this general order, a cease and desist order was issued against certain carriers and suit was brought by the Commission to enforce it.

The decision of the case turned on a legal question—whether the Commission could take into consideration the ocean voyage of imported goods as constituting a difference of "circumstances and conditions" justifying a difference in rates from those applicable to inland traffic. The trial court adopted the Commission's view that it could not take such facts into consideration, and upheld the order. The circuit court of appeals disagreed with this conclusion, but affirmed the judgment on the ground that the existing disparity in rates was too great to be justified by the difference of "circumstances and conditions", and hence that the rates were discriminatory.

This Court reversed and remanded the case to the circuit court with directions to dismiss the bill, agreeing with the circuit court of appeals on the legal question but dis-

agreeing as to the conclusion which followed therefrom, and holding that, by passing upon the question whether the rates complained of were in fact discriminatory, the circuit court of appeals had gone beyond its judicial powers and exercised a fact-finding function which belonged to the Commission. The respective functions of the Commission and the courts were defined as follows (at p. 238):

> "If the Circuit Court of Appeals was of opinion that the Commission in making its order had misconceived the extent of its powers, and if the Circuit Court had erred in affirming the validity of an order made under such misconception, the duty of the Circuit Court of Appeals was to *reverse the decree, set aside the order,* and remand the cause to the Commission, in order that it might, *if it saw fit,* proceed therein according to law."*

It is obvious that the Board's much abridged quotation (Br. in Op. to Cert., p. 15) gives a totally wrong impression of what the case decided.

Southern Ry. Co. v. *St. Louis Hay & Grain Co.*, 214 U. S. 297, was a suit at law to recover reparations awarded by the Commission, based upon a decision that a certain charge for reconsigning shipments of hay was discriminatory. In fixing the fair rate, the Commission held that the carrier should perform the service at cost.

This Court reversed a judgment for the plaintiff, holding that the carrier was entitled to a profit on the service. Pointing out that the testimony before the Commission was not in the record, and that the Court could not itself determine what rate would be fair, the Court said (at p. 302):

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*Italics ours.

"All we can do is to reverse the judgments of the Circuit Court and the Circuit Court of Appeals and remand the case to the former court with instructions to send the matter back to the Commerce Commission for further investigation and report."

Since the Commission was not a party to the case, all that this could mean is that the complaint would be dismissed and further steps in the rate controversy left up to the Commission. In other words, the obvious purpose of the "remand" was to avoid a final determination adverse to the plaintiff, thus permitting him at some later date to recover the proper amount of reparations if the rates paid by him were actually higher than a fair rate properly computed, and to permit the Commission to re-determine the rates on a proper basis and make an award of reparations to the plaintiff if he was entitled thereto.

It will be noted that in this case, as in all the others here cited, the Court did not relinquish any part of its own jurisdiction but decided all the issues that it was within its province to decide, and all that it was able to decide on the record before it.

Federal Trade Commission v. *Curtis Publishing Co.*, 260 U. S. 568, far from supporting the Board's contentions is an almost conclusive answer to them. The Federal Trade Commission had issued an order that respondent cease and desist from making or enforcing agreements prohibiting its wholesalers from selling the magazines of other publishers. It was held by both the Circuit Court of Appeals and by this Court that the Commission had failed to make findings on material issues of fact; and the Government argued that in such a case the proper course was to remand the case to the Commission with instructions to

make findings of fact on such issues. The Court held that such a "remand" would be futile because findings necessary to sustain the order would be without support of substantial evidence in the record and concluded (p. 582):

> "In the present cause the Commission has not found all the material facts, but considering those which it has found and the necessary effect of the evidence, the order to desist is clearly wrong and should be set aside without further delay."

It is this power of the court to dispense with a useless "remand" which might properly be designated by the Board's phrase—a "power to expedite".*

The Court stated the governing principle as follows (at p. 580):

> "If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should be remanded to the Commission—the primary fact-finding body—with direction to make additional findings, but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay the court has full power under the statute so to do."**

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*Br. in Op. to Pet. for Cert., page 15.

**Three judges doubted whether this statement clearly expressed their view of the law, although they agreed with its application in the particular case—their point being that a case should always be sent back to the Commission for additional findings of fact if the findings were insufficient and there was evidence in the record which might support the missing findings; that otherwise the courts would be taking over a part of the fact-finding function of the Commission (see 760 U. S. at 582).

It is apparent from this language that whatever power the court may have to remand it is not a "power to expedite", but is a power to take procedure which preserves the distinction of functions between the administrative body and the courts, even though it results in delay. It is this distinction of functions which the Board now seeks to obliterate by asserting a power to halt the process of judicial review whenever it decides that it would like to take further proceedings in the case.

In *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291, the court denied enforcement of the order of the Commission but did not "remand" the proceeding because the defect in the order was fundamental and incapable of cure.

In *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, the Commission ordered respondent, a blender of flour but not a miller, to cease and desist from doing business under a corporate name which included the words "milling company". This Court reversed a decision of the circuit court of appeals denying enforcement of the Commission's order, but held that the Commission had gone too far in requiring the respondent to give up the use of an established and valuable trade name, since the public interest could be protected by requiring the use of qualifying words to show that the respondent was not a miller. It therefore sustained the Commission's order in all particulars except as respects the corporate name, and remanded the case to the Commission so that it might "upon consideration of the present record and any further evidence which it may conclude to take" determine the "form and manner" of a representation which the re-

spondent would be required to use with its corporate title in order to make clear that it was not a miller (p. 218).

Here is an example of remand of a case so that administrative discretion might be exercised upon a subject as to which discretion had been conferred by statute on the administrative body.

From these cases it will be seen that the remand of a proceeding to an administrative body can never occur until the process of judicial review has been completed, and then only if the decision of the court, having adjudged the administrative order invalid and set it aside in whole or in part, does not dispose finally of the controversy but leaves the administrative body with a function still to perform.

There is no shred of support, either in the cases cited or elsewhere, for the proposition that a remand of the proceeding may be resorted to by the court in order to avoid decision of the case and substitute further administrative procedure for the judicial review which is provided for by the statute.

Other cases supporting the propositions set forth above are:

Louisville & Nashville R. Co. v. *Behlmer*, 175 U. S. 648, 675;

Saginaw Broadcasting Co. v. *Federal Communications Commission*, 96 F. (2d) 554;

Tri-State Broadcasting Co. v. *Federal Communications Commission*, 96 F. (2d) 564;

Heitmeyer v. *Federal Communications Commission*, 95 F. (2d) 91.

The foregoing authorities—involving judicial review of administrative orders under other statutes—fully sup-

port petitioner's construction of the Act, namely, that Congress contemplated a single proceeding in which the powers of the Board under Sec. 10(a) to (d) come to an end with the shift of jurisdiction to the court (*i.e.*, upon filing of the transcript of record), and that any subsequent exercise of jurisdiction by the Board must be confined to

(a) the statutory procedure for taking additional testimony under direction of the court, modifying findings and making recommendations for modifications of the order, and

(b) if the Board's order be set aside, such further proceedings, not inconsistent with the court's decision, as the Board may find it necessary to take in order to perform the duties imposed upon it by law; for example, if the Board has failed to make necessary findings which, if made, would be supported by the evidence (*cf. Federal Trade Commission* v. *Curtis Publishing Co., supra*); or if the Board has misconceived the scope of relief which it is permitted to give and the court "remands" the case to the Board for reconsideration of the matter and exercise of the discretion which the Act imposes upon the Board in respect of the granting of affirmative relief. *Cf. Federal Trade Commission* v. *Royal Milling Co., supra;* and see Sec. 10(c) of the Act.

In the present case the court did not set aside the order of the Board or make any determination with respect to the validity or invalidity thereof but, upon the mere statement of the Board that it wanted the case back, washed its hands of it without determining anything.

The Board's alleged analogous cases, if in point, do not support its contention.

(a) *Remand by an appellate court at the request of the lower court.*

The Board has asserted, and has cited certain cases to support, the following broad proposition:

> "An appellate court may return a record to a lower court on the application of the latter so that further proceedings or a rehearing may be had below, without deciding the merits." (Br. in Op. to Cert., p. 17.)

From the statement of this proposition it might appear to be the Board's view that an appellate court has a general and indiscriminate power to return a record to a lower court, at any stage of the proceedings on appeal, whenever the lower court asks to have the case back in order to change its decision or to take further proceedings to correct its own errors.

No such proposition is supported by the cases cited by the Board, or by any other cases.

The scope of the rule may be seen from a consideration of *Baltimore S. S. Co.* v. *Phillips*, 9 F. (2d) 902,* the only case cited by the Board in which it was actually applied.

In that case, a suit by a seaman for personal injuries, the defendant pleaded a previous decree in admiralty and upon such plea the district court dismissed the complaint. Plaintiff took a writ of error, but while it was pending, and before the term of the district court had expired, asked the district court for reargument on the question of law in-

*Reversed on grounds not here relevant, 274 U. S. 316.

volved. The district court thereupon requested the circuit court of appeals to return the record so that it might reconsider this question, and the record was accordingly returned. Then the district court vacated its judgment and, after trial, gave judgment for the plaintiff. This procedure was sustained on appeal on the authority of a *dictum* in *Roemer* v. *Simon*, 91 U. S. 149, in which the entire opinion of the Court was as follows:

> "It is clear, that, after an appeal in equity to this court, we cannot, upon motion, set aside a decree of the court below, and grant a rehearing. We can only affirm, reverse, or modify the decree appealed from, and that upon the hearing of the cause. No new evidence can be received here. Rev. Stat. sect. 698. The court below cannot grant a rehearing after the term at which the final decree was rendered. Equity Rule, 88. It would be useless to remand this cause, therefore, as the term at which the decree was rendered has passed. If the term still continued, the proper practice would be to make application to the court below for a rehearing, and have that court send to us a request for a return of the record, in order that it might proceed further with the cause. Should such a request be made, we might, *in a proper case* and *under proper restrictions*, make the necessary order; but we cannot make such an order on the application of the parties. The court below alone can make the request of us. The application of the parties must be addressed to that court, and not to us."*

In the other cases cited by the Board, the "remand" or similar relief sought by the appellant was denied on the

*Italics ours.

granting of it by the appellate court held erroneous, upon the grounds indicated in the parenthetical explanations below:

Realty Acceptance Corp. v. *Montgomery*, 284 U. S. 547. (No power in appellate court to remand for the purpose of introducing newly discovered evidence because there was no power in trial court, its term having expired, to re-open the proceedings for the receipt of such evidence.)

Hall v. *United States*, 78 F. (2d) 168. (No power in the circuit court of appeals to grant a new trial for newly discovered evidence, and no such power in the trial court while the appeal was pending; proper procedure would have been for the trial court to request the circuit court of appeals to return the record so that, before the term of court expired, the motion for a new trial might be considered.)

It is apparent that these cases establish no more than that, after an appeal has been filed and before the term of the lower court has expired, the appellant—as an alternative to dismissing his appeal and then applying to the lower court for further proceedings—may accomplish the same result (and at the same time protect himself from loss of his right to appeal by refusal of the lower court to entertain his application*) by presenting to the lower court his rea-

*That this is the correct interpretation of the cases is shown by the fact that, when the application by the lower court for the return of the record has been made on appeal from an interlocutory decree —so that a dismissal of the appeal would not deprive the plaintiff of his right of appeal at a later stage of the proceedings—the courts have not returned the record to the lower court but have instead dismissed the appeal without prejudice to further proceedings. *Mossberg* v. *Nutter*, 124 Fed. 966; *Wagner* v. *Meccano, Ltd.*, 235 Fed. 890; *cf. Greene* v. *United Shoe Machinery Co.*, 124 Fed. 961.

sons for wishing such further proceedings to be taken and having that court request the appellate court to send the case back so that it may take such proceedings.

The cases just discussed would sustain the Board's position only if they held that, where the defendant appeals from an adverse decision, the *appellee* (corresponding to the Board in its capacity of prosecutor and party) and the court (corresponding to the Board in its judicial capacity) may ask for and obtain from the appellate court a return of the record *over the appellant's objection* so that some of the "questions" raised by the appellant's assignments of error may be "obviated on the transcript of record" before the appeal is decided by the appellate court. Obviously they hold no such thing. In every one of the cases the appellant was the moving party and the action taken by the court was for his benefit. There is nothing in the cases to suggest that an appellee may procure a remand of the case for the purpose of further proceedings before the trial court designed to correct errors assigned by the appellant on his appeal.

The foregoing cases uniformly hold that when the lower court's power to modify or set aside its decree has come to an end by expiration of the term of court at which the decree was made, a remand of the case or return of the record, without decision of the appeal, would be useless and therefore may not be had. This suggests a close analogy. The power of the Board to modify or set aside its orders is precisely defined by Sec. 10 (d) of the Act, and under the express provisions of that subsection such power exists only

> "*Until* the transcript of record has been filed in a court * * *".

That time had expired when the court below made its order of remand. The purported remand was therefore a futile thing, incapable of restoring to the Board a power which the statute had already taken away from it. Hence on this ground alone the order of the court below was clearly erroneous.

(b) *Remand by an appellate court without application by the trial court*

The Board has also asserted, and has cited certain cases to support, the following equally broad proposition:

> "Even without such an application [*i.e.*, an application by the trial court for the return of the record] an appellate court may remand to the lower court for further supplementary proceedings without deciding the appeal."

Here again the Board states its proposition so broadly that one might suppose that an appellate court has a general and indiscriminate power to remand a case to a lower court, at any stage of the proceedings on appeal, whenever the appellate court may care to do so, and without deciding anything.

No such proposition is supported by the cases cited by the Board, or by any other cases. The Board has cited:

Ballard v. *Searls*, 130 U. S. 50;
Jensen v. *New York Life Ins. Co.*, 50 F. (2d) 512;
Podlesak v. *McInnerney*, 26 App. D. C. 399.

In *Podlesak* v. *McInnerney*, the District of Columbia Court of Appeals, being unable to arrive at a decision on a

question of priority of invention, sent the case back to the Commissioner of Patents "for further consideration". As the court was not exercising a judicial jurisdiction, but was sitting as an administrative tribunal of the Patent Office, the case is not in point and gives no support to the Board's proposition.

Both *Ballard* v. *Searls* and *Jensen* v. *New York Life Ins. Co.*, are cases involving the effect to be given by the appellate court to a supervening judicial decision in another action involving or affecting the same parties.

In *Ballard* v. *Searls*, the defendant appealed from a decree setting aside a conveyance to him as in fraud of creditors, plaintiff being a judgment creditor. While the appeal was pending, this Court in another action reversed the judgment which gave the plaintiff his status as a creditor, so that, as the Court said, "the whole basis and foundation of the present suit has disappeared" (at p. 53). The Court held, however, that to reverse the decree on that ground would require the exercise of original jurisdiction; and it therefore remanded the case to the lower court with instructions to allow the defendant to file a bill to set aside the judgment by reason of the supervening fact.

Jensen v. *New York Life Ins. Co.*, involving an action to cancel an insurance policy, was somewhat similar, the supervening event being a decision in another action between the same parties, the effect of which could not be determined on the record before the appellate court. The court indicated that there were various methods which it might use to bring into litigation in the action before it the effect of the other judgment, and decided that it would adopt the somewhat unusual procedure of retaining the appeal before it but remanding the case to the trial court

with leave to the insured to have the cause reopened for the filing of a supplemental pleading and the introduction of evidence on that issue.

It is apparent that these cases involve a most unusual type of situation, bearing no resemblance whatever to the present case, and giving no support to the broad proposition asserted by the Board.

In the cases cited and in the numerous other cases of the same kind which might be cited, the appellate court refused to decide the case, because of the absence from the record of facts necessary for a final determination of the controversy, and remanded the case to the lower court because only the lower court had jurisdiction to take the proceedings necessary to make these facts of record.

In the present case, it is not alleged by the Board that any additional facts must be determined, or that any issue has been left undecided which the Board is required to decide. It merely refers to this Court's decision in *Morgan* v. *United States, supra,* denies that the decision has any application to the present case, and asserts that it nevertheless desires to serve an interim report and to permit the respondent to except and argue thereto.

Moreover, if any facts were missing from the record which the Board might desire to bring before the court, whether supervening facts or facts in existence at the time of its report, it would not be necessary to rely on general principles or "inherent powers" to get such facts into the record; for Congress has envisaged the precise situation and has laid down a definite and simple procedure to be followed in the taking of additional testimony—a procedure wholly inconsistent with a "remand" of the case to the Board.

(c) *Recommitting of special masters' reports*

In arguing that a court has an "inherent" power to remand a case to an administrative tribunal for reconsideration thereof whenever the latter so requests, the Board refers to the power of a court of equity to recommit a special master's report for reconsideration, upon application of the special master.* The analogy is presumably used because of the reference in the *Republic* case (*In re National Labor Relations Board*, 58 Sup. Ct. 1001), in which Sec. 10 (d) of the Act was compared with statutes authorizing masters in chancery to modify or recall reports after submission to but before action by the court.

The Board uses the analogy in an entirely different way, and no considerable discussion of the subject of special masters' reports would seem to be required, because the Board's analogy is most remote. The relationship between the circuit court of appeals and the Board, in a proceeding to enforce or set aside the Board's order, bears little or no resemblance to the relationship between the court and the special master whose report has been submitted to the court for confirmation. A special master is a disinterested party and not a litigant. The court's "inherent power" over him is due to the fact that he is an officer of the court, acting pursuant to the court's instructions, in a proceeding which is before the court and over which the court has control. His situation is analogous to that of one of the Board's examiners appointed to hear the testimony and make an interim report.

*Br. in Opp. to Pet. for Cert., p. 17.

The cases cited by the Board are not in point also because we are not dealing with an "inherent" power but with a power created and defined by statute.

But if the cases involving special masters' reports are in any way analogous, they may be referred to for their bearing on a more fundamental issue here presented, namely, the propriety of the Board's sitting in judgment on its own decision when the decision is challenged on the basis of fundamental irregularities in the Board's exercise of its judicial function.

Fitchburg Steam Engine Co. v. *Potter*, 211 Ill. 138, is in point. At a hearing before the court, it was brought out that the Master, without having announced his decision and without notice to the defendant, had granted to counsel for the plaintiff the privilege of framing the findings of fact; that the Master had accepted the findings so prepared together with conclusions of law and a recommendation of a decree in favor of the plaintiff, and with only minor changes in phraseology had filed them as his own report.

The Chancellor did not accept the Master's findings, but entered a decree favorable to the defendant. This was reversed by the intermediate court, which directed that a final decree be entered in accordance with the Master's report. The Supreme Court of Illinois reversed this decision and ordered that proceedings should be instituted *de novo* before a new master.

The Court held that the Master's report should be suppressed because the preparation of his findings and conclusions by an interested attorney was not only a practice of questionable morality, but also because (p. 148):

"It tends to prevent that fair and impartial investigation of the proofs and the law by the master and that more thorough re-examination of the case which would become necessary if the master should discharge his own duties and set forth his own findings. A report so prepared is likely to warp the judgment and discretion of the master and to lead to a biased and prejudiced view of the weight of the evidence, the principles of law applicable thereto, and to induce him to accept and report to the court an erroneous recommendation as to the proper decree to be entered in the cause. Nor does the evil end there, for the findings, conclusions, and recommendation penned by counsel come to the chancellor purporting to be the solemn, official act of the master, to which weight should be given as taken after full and impartial investigation of all the proofs and the principles of law applicable thereto. * * *"

The court next concluded that the conduct of the master prevented re-referenee of the proceeding to him, saying (at pp. 151-2):

"The conduct of the master, which required the suppression of his findings of law and fact and recommendation for a decree, would forbid a re-reference to him. Reference to some other master would become, therefore, the only course to be pursued."

Finally, the court concluded that it would be necessary to begin the proceeding anew before another master, unless the parties should agree to use the proof taken before the former master. The court said (p. 152):

"The objections to the master's report of the proofs challenged the correctness of the decision of the

> master with reference to the admissibility of certain proof, and the newly selected master could not be bound by the conclusion of the former master as to the admissibility of such testimony. Furthermore, the newly selected master, in order to correctly determine contested questions of fact from conflicting oral testimony, ought to have, and would be entitled to have, the aid to be derived from seeing the witnesses and hearing them testify. The benefit of seeing the witnesses and hearing them testify has been repeatedly declared by this court. The master to whom the case is re-referred ought not, except by agreement of the litigants, be directed to report findings of fact and conclusions of law from the proof as reported by the master to whom the cause had been first referred. 'Where a referee becomes disqualified to act, all proceedings upon the trial before him necessarily end, and it is not within the power of the court in appointing a new referee to hear and determine the cause, to compel the new referee to decide the issues upon testimony taken before or rulings made by the referee first appointed.' 17 Ency. of Pl. & Pr. 1085."

It is obvious from the reasoning of the court that, had the master desired to mend his ways, and requested the return of his report for reconsideration, so that he might make his own findings without help from the plaintiff's counsel, the court would have held such recommittal improper because of the inherent difficulty of obtaining a fair decision after the events which had transpired.

Under the allegations of petitioner's petition in the present case, what the Board did in arriving at its findings and order was substantially what the master did in the *Fitchburg* case; and that case is a reminder that the issues raised

by the petition (and by the answer in No. 182) are of such a nature that the correct disposition of them by the courts is of great importance. The case is also a reminder of the absurdity of the Board's claim that it has the right to oust the court's jurisdiction to pass on these issues, and to sit in judgment on itself.

C. The action proposed by the Board purports to meet only one group of objections to the order which have been raised by the petition.

The Board's argument in favor of a remand of the case has been based upon its assertion of willingness to conform to the procedure suggested to it by the opinions in the *Morgan* cases, namely, the filing of a tentative report to which petitioner will be allowed to except and argue, and the making of a new order following such proceedings. It is said that there is no point in the court's deciding whether the failure to follow such procedure in the past was erroneous, since the Board is willing to accord the benefits of such procedure to the petitioner without litigating the point and without an order of the court requiring it to do so. It is suggested that by remanding the case for this purpose the court is exercising a "power to expedite".*

In making this argument, the Board wholly ignores the fact that its proposed procedure meets only one of the issues raised by petitioner in challenging the order.

For example, the allegations of paragraphs 13 to 17 of the petition (R. 66-67), dealing with the conduct of the

*Br. in Op. to Cert., page 15. The phrase seems to have been invented by the Board, as it does not appear in the cases in connection with which it is used.

hearing by the Trial Examiner, raise objections which cannot be cured by the serving of an interim report. They can only be cured either by a dismissal of the entire proceeding and (assuming the power of the Board in the premises) the institution of a new proceeding, or by an entirely new hearing, or by the taking of additional evidence which will permit the petitioner to make its defenses properly and in accordance with the requirements of a fair trial.

If petitioner's contentions with respect to the conduct of the Trial Examiner are valid and are fatal to any order based upon the hearing already held, there can be no point in sending the case back to the Board for the issuance of a tentative report, and the making of a new order, based on that hearing. The Board (while not binding itself even to do that) proposes to take further proceedings based on the record already made. If it does so, and makes a new order based on such record, the same questions as are now raised will have to be passed on by the Court in a subsequent proceeding to enforce or set aside the new order, and the alleged "power to expedite" will prove to be no more than a power to delay the trial of issues upon which the Act entitles the petitioner to be heard now.

If, on the other hand, the errors of the Trial Examiner are not fatal to the proceeding but may be cured by a new hearing or by the taking of additional evidence, then it is clearly improper to send the case back to the Board. If the errors of the Trial Examiner may be cured by the taking of additional testimony, the statute clearly provides that such additional testimony shall be taken pursuant to order of the court, and under the court's jurisdiction, and subject to the court's control over the effect of such additional evidence, and any new findings based thereon, upon the

enforcement, modification or setting aside of the Board's order.

Moreover, the questions which arise at the outset—namely (1) whether or not the errors of the Trial Examiner are fatal to the proceeding, and (2) whether, if not fatal, the proper method of curing them is by a new hearing or by the taking of additional testimony—are clearly questions of law to be passed upon by the court, and not questions which lie within the scope of the Board's functions.

Similar questions of law, clearly requiring a decision by the court, arise under other allegations of the answer.

Paragraphs 18 to 49 allege facts with respect to the conduct of the Board itself in the making of its findings and order (R. 67-72). It is petitioner's contention that such facts, if established, would raise a serious question whether the Board could take any further action in this proceeding. The same question is raised by the amendments to the petition which the petitioner has sought permission to file (R. 81, 106).

Petitioner has made allegations as to the manner in which the prosecuting and judicial functions of the Board were commingled throughout the entire proceeding; and these allegations, if sustained, petitioner would contend would vitiate the entire proceeding before the Board and would require the court to set aside the Board's order with prejudice to any further action in the proceeding (R. 83, par. 35-c).

Petitioner has alleged that the Board in reaching its decision improperly communicated with persons who participated in the prosecution of the case and with other persons having no official connection with the Board, as a

result of which the Board's decision was not based upon the evidence but upon matters extrinsic to the record, political and otherwise (R. 15, pars. 34, 35; R. 70, pars. 35, 36; R. 82-83, pars. 35, 35-a, 35-b, 35-c). These allegations, if sustained, petitioner would contend would require the court below to set aside the order of the Board with prejudice to any further action by the present members of the Board in this proceeding, since the prejudicial effect of such matters would be irremediable.

Petitioner has alleged that the Board entertains a fixed bias and prejudice against petitioner and in favor of the complaining union (R. 106, par. 48-a). These allegations, if sustained, petitioner would contend would require the court below to set aside the Board's order with prejudice to any further action in this proceeding.

Petitioner has alleged that the purported decision of the Board is in fact the decision of its subordinates and that the Board itself gave no judicial consideration thereto (R. 12-17, pars. 17-39, 47; R. 67-72, pars. 18-40, 48; R. 107, par. 38). These allegations, if sustained, petitioner would contend would require the court below to set aside the order of the Board with prejudice to any further decision or order reached in the same manner.

None of the foregoing issues, either as to fact or as to law, can be eliminated from the case by affording petitioner an opportunity to urge before the Board objections to proposed findings. None of them can be "obviated on the transcript of record". Many of them are issues which cannot be determined from the transcript of record. The Board's attempt to withdraw the proceeding from court seeks to avoid a present determination of these issues. Whatever the Board's reasons for seeking to delay such

determination, petitioner will be prejudiced thereby, since it will be subjected to the vexation, delay and expense of further proceedings before the Board which would not be permissible if petitioner's allegations should be sustained; which would be unnecessary if petitioner's allegations should not be sustained, and which in any event would not affect the validity of petitioner's objections or impair its right, if it now has such a right, to a decree setting aside the Board's order on any ground other than the particular objection to which the Board's proposed action is addressed.

It is submitted that it is petitioner's right under the Act to have such issues passed on at once, and not after a further and possibly futile proceeding before the Board.

Even if the sole ground alleged by the petitioner, in its petition in No. 183, for setting aside the order of the Board had been the failure of the Board either to serve an intermediate report and allow the petitioner the right of argument and exception thereto, or in some other manner to meet the requirements of "fair play" referred to in *Morgan v. United States, supra,* the order of remand would nevertheless have been improper; for under all the applicable authorities it would have been the duty of the court to determine whether such failure invalidated the Board's order and, if so, to give legal effect to such determination or, if the Board's willingness to concede the point might be regarded in the nature of a plea of *nolle contendre,* to set aside the Board's order before sending the case back to it for further proceedings.

Such, in our view, would be the principles applicable if the failure to meet the tests of the *Morgan* case were the only issue raised by the petitioner in its answer. When, however—as is the fact here—petitioner has raised other

fundamental issues which the Board has not attempted to meet and by its announced course of action does not propose to meet, there is neither principle nor authority to support the asserted power of the court to abdicate its statutory jurisdiction by remanding the cause for the voluntary correction of one group of alleged errors, without passing upon any of the grounds of invalidity alleged in the petition.

D. The Board's suggestion that the court below did not have jurisdiction of the petitioner's case raises issues which are not before the Court and in any event is without merit.

In suggesting that the court below (in lieu of granting the motion to remand) should have vacated its order of May 9 directing that the certified transcript be deemed filed in petitioner's case, the Board has cast doubt upon the jurisdiction of the court below.* It is suggested:

(1) That petitioner did not itself file the record in its case below, but merely took advantage of "the accident of the physical presence in the files of the court of the record" to obtain the order making the record filed in the Board's case also the record in petitioner's case; and that therefore petitioner did not comply with the provision of Sec. 10 (f) which requires that "the aggrieved party shall file in the court" a transcript of the record;

(2) That between May 5 (the date of the order allowing the Board to withdraw its petition) and

*Br. in Op. to Pet. for Cert., pp. 13-14.

May 9 (the date of the order respecting the filing of the transcript of record in petitioner's case), the Board had "assumed jurisdiction" of "the proceeding". This assumption of jurisdiction the Board claims to have accomplished by serving on petitioner, while its motion to avail itself of the transcript filed by the Board was pending, to wit, on May 6, a notice of its intention to vacate its order and take further proceedings on May 10, "unless sufficient cause to the contrary shall then appear". It is also claimed that the order of May 9 respecting the transcript was ineffective because, the Board's notice of May 6 not being a part of the transcript, there was not on file "a transcript of the entire record in the proceeding" which the statute requires.

It is believed that the Board has no standing to raise these points in this Court. The Board explains its failure to raise them by a petition for a writ of certiorari on the ground that the granting of the motion to remand had "the same practical result" as the granting of the motion to vacate would have had.* The Board's explanation, however, is an admission (1) that it waived any objection to the manner in which the court below obtained jurisdiction in petitioner's case by making its motion to remand, which presupposed that the court had jurisdiction in petitioner's case,** and (2) that, not having petitioned this court for a writ of certiorari to review the order of May 9

*Br. in Op. to Cert., p. 14.

**_Martin's Administrator_ v. _Baltimore & Ohio R. Co._, 151 U. S. 673; _Beyer_ v. _Le Fevre_, 186 U. S. 114.

directing that the certified transcript be deemed filed in petitioner's case or of the order of June 10 refusing to vacate the order of May 9, it has no standing in this court to object to the manner in which the court below obtained jurisdiction in petitioner's case.* The Board, therefore, can be heard before this court in petitioner's case only in support of the order of remand.**

However, the discussion of the Board's jurisdictional points may serve to clarify the issues; and such discussion will show that they are wholly without merit.

1. *The jurisdiction of the court in petitioner's case was complete upon the filing of the petition, independently of the order of May 9.*

We cannot believe that the Board will seriously argue that every aggrieved party who wishes to file a petition under Sec. 10(f), in a court where a petition under Sec. 10(e) or a previous petition under Sec. 10(f) has already been filed, must get a new transcript of record and add that to the court files along with the one already there. Not only would such a rule impose a large and wholly unnecessary expense on both the Government and the aggrieved parties, but it would be contrary to the uniform practice of courts in all analogous situations.

To show to what absurdities such a requirement would lead, let us suppose that the Board files a petition for the enforcement of an order against an employer, and there

*Morley Construction Co. v. Maryland Casualty Co., 300 U. S. 185, 191; Alexander v. Cosden Co., 290 U. S. 484, 487; Peoria Ry. Co. v. United States, 263 U. S. 528, 536; The Maria Martini, 12 Wall. 31, 40-41.

**Peoria Ry. Co. v. United States, supra, at p. 536.

are the following "parties aggrieved" by the order besides the employer:

1. Union A, the complainant in whose favor the case has been decided, but which does not think that the Board has gone far enough and wants the order modified so as to go further—*e. g.*, so as to compel the employer to recognize it as the exclusive representative of the employees.

2. Union B, an unsuccessful party, which wishes to have the order set aside.

3. An employee who has asked for and been denied reinstatement, and who seeks to have the order modified in his favor.

4. An employee who has been granted reinstatement without back pay, and who seeks modification of the order so as to grant him back pay.

5. An employee who has been granted reinstatement with back pay, but who claims a larger amount of back pay and seeks to have the order modified accordingly.

Would any one contend for a moment that the statutory words "the aggrieved party shall file" would require each of these parties upon filing his petition for review to obtain, or the Board to furnish to him, a new transcript of record? It seems to us that the question answers itself; that so futile and wasteful a requirement cannot be attributed to Congress, and hence that the statute may not be construed literally, so as to require filing of a multiplicity of transcripts in the same court, but must be construed in accord-

ance with its substantial purpose, namely, to grant exclusive jurisdiction to the court in which the transcript of record is first filed.

In short, the jurisdiction of the court depends upon the actual presence of the record,* and not upon the question of who has filed it; and once the transcript has been duly filed, it is available to all subsequent parties who seek review of the same order.

If, as we believe, such is the proper construction of the Act, then the exclusive jurisdiction of the court over the petitioner's case was complete on May 4, when its petition was filed and notice thereof given, since the transcript required by the Act was already on file, and all the requirements of Sec. 10 (f) had been fulfilled. The order of May 9, that the transcript should be deemed filed in petitioner's case, was merely confirmatory of the legal effect of the filing of the petition and was a purely procedural order which authorized the clerk of the court to make the appropriate entries on his docket, to give the transcript of record the number of petitioner's case as well as that of the Board's case, and to take such other steps as might be necessary in the internal administration of the court.

There is no statute specifically providing for the use of one transcript of record in two or more proceedings under Sec. 10 of the Act involving the same order of the Board. But one of two things must be true: Either the practice is to be governed by the statutes regulating ap-

*The obvious purpose of the Act, in conferring jurisdiction upon the first court in which the record is filed, is to give the Board a practical control over the choice (where there is a choice) of the circuit court of appeals where the issue shall be litigated. *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 83 F. (2d) 731.

peals to circuit courts of appeals or, such statutes being inapplicable, the several circuit courts of appeals under their rule-making powers have the right to determine for themselves whether or not a single record is to be used. In either case the contention of the Board must be rejected.

If the matter is a subject to be dealt with by the several circuit courts of appeals, under the statute which empowers them to make rules for their own procedure (U. S. C. A. Tit. 28, § 219), then the court below has ruled in this case that a single record is appropriate, and that the filing of a petition under Sec. 10 (f) makes the record on file available to the petitioner forthwith. For it expressly provided in its order that the effective time of filing of the record in No. 183 should be "the time of filing in this Court by petitioner of its petition to review and set aside the order of the Board" (R. 80), thus clearly expressing its view that jurisdiction of the petitioner's case became complete at that moment of time.

On the other hand, if this matter is not one for the several circuit courts of appeals to rule on, but is to be governed by the statutes regulating appeals and the practice established thereunder, there can be no doubt that the transcript of record as first filed is available to all subsequent parties who seek review or modification of the order. U. S. C. A. Tit. 28, § 864, provides for one record on two or more related appeals to the Supreme Court, and under § 228 of the same Title the provision is applicable to appeals to the circuit courts of appeals.

Cf. Ballew v. *United States*, 160 U. S. 187, 201;

Realty Acceptance Co. v. *Montgomery, supra*, at 550;

Kansas v. *Meriwether*, 171 Fed. 39, 41;
Rederiaktebolaget Amie v. *Universal Transp. Co.*, 245 Fed. 282, 283.

The use of a single record, though so well established that it seldom is the subject of decision, is familiar practice and is uniformly sanctioned.

Gregory v. *Pike*, 64 Fed. 415, 416;
Aberly v. *Craven County*, 70 F. (2d) 52;
United States Trust Co. v. *Western Contract Co.*, 81 Fed. 454, 470;
Hughes, Fed. Prac. § 5734;
6 Cyc. Fed. Proc. §§ 2732, 2801.

The practice has been embodied in Rule 75 (k) of the new Rules of Civil Procedure for the District Courts, recently adopted by this Court.

It is the practice to make use of a single record, and to permit a subsequent party to take advantage of a record already filed, even under a statute or rule which on its face makes the filing of the record by any and every party a condition of the relief sought by that party. For example, under the statute requiring applications for writs of certiorari to this Court to be made within a specified period, this Court has enacted a rule (Rule 38) which provides:

> "The petition will be deemed in time when it, the record, and the supporting brief, are filed with the clerk within the period prescribed by Section 8 of the Act of February 13, 1925, * * *."

This rule and the statute are by their terms applicable to each party asking for certiorari in a particular case.

Nevertheless, where one party has filed a petition for certiorari and the record, it has been the uniform practice of this Court not to require subsequent petitioners to file the record, but they are permitted to use the record filed with the first petition. See Robertson, *Practice and Procedure in the Supreme Court of the United States,* page 179.

In the light of these authorities, the court below properly ruled—and certainly had the power to rule—that the transcript of record on file in No. 182 became available to the petitioner immediately upon the filing of its petition in No. 183. If the court had the power so to rule, the correctness or incorrectness of the exercise of such power is not before this Court.

2. *The issuance by the Board of the notice of May 6 had no effect on the jurisdiction of the court.*

The Board's second point respecting the jurisdiction of the court below is based upon the issuance by the Board, on May 6, of a notice which appears at page 54 of the record. It is headed with the title of the proceeding before the Board, addressed to counsel for petitioner, and reads as follows:

> "Please Take Notice that on Tuesday next, May 10, 1938, In the Matter of Ford Motor Company and International Union, United Automobile Workers of America, Case No. C-199, the National Labor Relations Board, unless sufficient cause to the contrary shall then appear, will vacate and set aside its findings and order in said case made December 22, 1937, for the purpose of further proceedings before the Board."

The Board attempts to analogize this situation to the situation presented in the *Republic* case (*In re National Labor Relations Board, supra*), in that it claims that because of its notification of May 6 its order did not thereafter represent its "final action, the review of which the statute provides".

No such analogy exists. The court's jurisdiction of the proceeding was complete in petitioner's case on May 4, when the petition to set aside was filed and the transcript of record was on file in the court. The *Republic* case recognized no power in the Board to defeat a vested jurisdiction of the court by announcing that its order no longer represented its "final action". On the contrary, the opinion in that case is based expressly upon the ground that when the Board decided that its order no longer represented its "final action" the certified transcript of record had not yet been filed in court and there had not yet been the "plenary submission of the cause" to the court which takes place upon such filing; that, accordingly, jurisdiction of the proceeding had not in fact passed from the Board to the court.

But even if jurisdiction did not attach in petitioner's case until May 9, when the court below ordered that the transcript be deemed filed in petitioner's case as of May 4, the situation is entirely different from that presented in the *Republic* case. In that case the Board had never lost jurisdiction of the proceeding, yet the lower court had enjoined the Board from taking any further steps in the proceeding. In this case the Board itself invoked the jurisdiction of the court on January 7, 1938 (R. 1) and on May 5, when the court entered its order granting leave to the Board to withdraw its petition for enforcement and the certified transcript, the court had had jurisdiction of the proceeding

for almost four months; and when such order of May 5 was entered, petitioner's petition for a review and its motions with respect to the filing of the transcript were already on file (R. 62, 39, 78).

It is plain that the court below did not intend by its order of May 5 to divest itself of jurisdiction of "the proceeding" before passing upon petitioner's pending motions as to the transcript, which were returnable May 9, for the court in fact set such motions down for argument on the return day (R. 88). Nor did the Board—though in its opposition (filed May 9) to the petitioner's motion to consolidate the two cases it referred to the May 6 notice—make any contention therein that by reason of such notice the court no longer had jurisdiction of the proceedings.

It is clear, therefore, that the court's order of May 5 cannot be construed as revesting in the Board jurisdiction of the proceeding, and that the parties understood that the order had no such effect.

Finally, the court below on May 9 vacated so much of its order of May 5 as granted to the Board leave to withdraw the transcript, thus exercising its plenary power to alter its own order at the term at which it was made; and the exercise of such power would have been effective even if the Board had attempted to withdraw the transcript during the intervening period, which, however, it did not purport to do.

Moreover, the order of May 5 granting the Board "leave to withdraw" its petition did not require it to do so; and the Board made no attempt to exercise such leave until June 2 (R. 55), two days after this Court denied the petition for rehearing in the *Morgan* case (304 U. S. at p. 23). Had this Court acted otherwise on that petition, the Board

could have chosen not to exercise the leave granted to it, but instead to proceed with the case.

Jurisdiction of "the proceeding" therefore never was returned to the Board, but continued always in the court, regardless of whether jurisdiction attached in petitioner's case on May 4 or on May 9. The Board's order of May 6 was not an order in the proceeding because the Board had no jurisdiction of the proceeding, and no power to make any order therein.

The court's order of May 9 is in no way similar to the injunction against the Board involved in the *Republic* case, but is merely one of three orders which together gave effect to the court's decision to permit the Board to withdraw its own petition but to retain the jurisdiction of "the proceeding", which it had had for four months.

Moreover, if the Board's argument be based on the technical point that (assuming that jurisdiction could not attach until May 9) the record which the court on May 9 ordered to be deemed filed in petitioner's case was not a complete record because it lacked the notice of May 6, the argument is unsound for a number of additional reasons:

First, the Board's notice is not one of the papers which the statute specifically requires as part of the record (*i.e.*, the pleadings, testimony, findings and order). It is not any part of the basis upon which rested the order which petitioner seeks to have set aside, but is a paper which the circuit court of appeals might permit to be omitted from or included in the record, in its discretion. *Cf. Algoma Lumber Co.* v. *Federal Trade Commission*, 56 F. (2d) 774.* The order of May 9 was a proper exercise of such discretion.

*Reversed on grounds not here relevant, 291 U. S. 67.

Second, the notice of May 6 was not in existence when petitioner filed its petition and asked that the record in No. 182 be deemed filed in No. 183; and if a supervening event made necessary the inclusion in the record of an additional paper, it could be included on application of either party or on the court's own motion, under familiar principles. *Clinton* v. *Mo. Pac. Ry.*, 122 U. S. 469; *cf. Sweeney* v. *Lomme*, 22 Wall. 208; *Morgan* v. *Curtenius*, 19 How. 8.

Third, it has never been held that jurisdiction of an appellate or reviewing court depends upon the filing of a perfect record. All that is required is that the record shall be one which has been certified (as the record below has been certified) by the proper officer as the transcript of record in the proceeding; and where the record is incomplete, or where a missing paper is required for the decision of the case, the proper remedy is not a motion to dismiss for lack of jurisdiction but a petition for certiorari to correct a diminution of the record, or the equivalent motion under the practice of the particular court. *Railroad Co.* v. *Schutte*, 100 U. S. 644; *Missouri, Kansas & Tex. Ry. Co.* v. *Dinsmore*, 108 U. S. 30; *State of Kansas* v. *Meriwether*, 171 Fed. 39; *Merriman* v. *Chicago, D. & V. R. Co.*, 120 Fed. 240.

Finally, when the court passed on the petitioner's motion and made its order on May 9, a properly authenticated copy of the notice had been filed in the proceedings by the Board itself, as an exhibit to its opposition (R. 54). As such, it was clearly part of the record before the court and any technical defect in the record had thus been cured.

For the numerous reasons above stated, it is submitted that the Board's suggestion that the court did not acquire

jurisdiction of petitioner's case is devoid of merit, even assuming that the Board has any standing to raise the point in this Court.

POINT III

The orders below should be reversed and the cases remanded to the Circuit Court of Appeals for further proceedings in accordance with Section 10 of the National Labor Relations Act.

Respectfully submitted,

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November 28, 1938.

APPENDIX

Subsecs. 10(d), 10(e) and 10(f) of the National Labor Relations Act

"(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

"(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board.* Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in

*For brevity, the references in this subsection (e) and in subsection (f) to the Court of Appeals of the District of Columbia and to the district courts (which have jurisdiction when the Circuit Courts of Appeals are in vacation) have been omitted.

such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the

Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, * * * by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."